Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3971

Appeal PA12-296-2

University of Ottawa

June 28, 2019

Summary: This appeals deal with an access request made to the University of Ottawa (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to a named organization over a specified period of time. The university located records and granted access to them, in part. The university denied access to other records, claiming the exclusion in section 65(8.1)(a) (research), the mandatory exemption in section 17(1) (third party information), and the discretionary exemption in section 18(1)(c) (economic and other interests). In this order, the adjudicator finds that the exclusion in section 65(8.1)(a) does not apply. She further finds that the exemptions in sections 17(1) and 18(1)(c) apply to some, but not all, of the records. The university's exercise of discretion under section 18(1)(c) is upheld. The university is ordered to disclose the non-exempt information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 65(8.1)(a), 17(1)(a), 17(1)(b), 17(1)(c) and 18(1)(c).

Orders and Investigation Reports Considered: Orders PO-3243 and PO-3463-I.

OVERVIEW:

[1] This order disposes of the issues raised from an appeal of an access decision made by the University of Ottawa (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for copies of all records related to a named organization over a specified time frame.

[2] The university located records responsive to the request and granted access, in part. The university withheld certain records, claiming the application of the exclusion in

section 65(8.1)(a) (research exclusion), the mandatory exemptions in sections 17 (third party information) and 21(1) (personal privacy), as well as the discretionary exemption in section 18 (economic and other interests). Further, the university withheld some information as being not responsive to the request.

[3] The requester (now the appellant) appealed the university's decision to this office.

[4] During the mediation of the appeal, the appellant indicated that he was not interested in pursuing access to the information identified as not responsive, or withheld under section 21(1). Consequently, any personal information contained in the records is no longer at issue, as well as any information previously identified as being not responsive to the request.

[5] Also during mediation, the university provided notice to an affected party (the organization named in the request), who consented to disclose some of the information relating to it. As a result, the university issued a supplementary decision letter to the appellant, disclosing further records.

[6] The file was then moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The file was placed on hold pending the disposition of the appellant's other related appeals. The file was reactivated and the adjudicator assigned to the file commenced the inquiry by seeking representations from the university, the affected party, and the appellant. The university and the affected party provided representations. The appellant did not provide representations. The file was then transferred to me to continue the inquiry. I sought supplementary representations from the appellant, but he did not provide representations.

[7] For the reasons that follow, I find that the exclusion in section 65(8.1)(a) does not apply to any of the records. I further find that the exemptions in sections 17(1) (third party information) and 18(1)(c) (economic and other interests) apply to some, but not all, of the records. I uphold the university's exercise of discretion under section 18(1)(c). I order the university to disclose the non-exempt information to the appellant.

RECORDS:

[8] The records consist of emails, a draft memorandum of understanding, cover letters, backgrounders, a business plan, workshop agendas, biographies of members/speakers, terms of reference, and membership criteria. I note that there is extensive duplication of content in these records.

ISSUES:

A. Does section 65(8.1)(a) exclude the records from the *Act*?

B. Does the mandatory exemption at sections 17(1)(a), (b) and/or (c) apply to the records?

C. Does the discretionary exemption at section 18(1)(c) apply to the records?

D. Did the institution exercise its discretion under section 18(1)(c)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does section 65(8.1) exclude the records from the *Act*?

[9] The university is claiming the application of the exclusion in section 65(8.1) to records 13, 14, 15, 16, 249 and 268. The affected party is claiming that the exclusion applies to records 53 and 146.

[10] Section 65(8.1) states:

> (8.1) This Act does not apply,
>
> > (a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution; or
> >
> > (b) to a record of teaching materials collected, prepared or maintained by an employee of an educational institution or by a person associated with an educational institution for use at the educational institution.

[11] Sections 65(9) and (10) create exceptions to the exclusion found at section 65(8.1).

[12] These sections state:

> (9) Despite subsection (8.1), the head of the educational institution shall disclose the subject-matter and amount of funding being received with respect to the research referred to in that subsection.
>
> (10) Despite subsection (8.1), this Act does apply to evaluative or opinion material compiled in respect of teaching materials or research only to the extent that is necessary for the purpose of subclause 49(c.1)(i).

[13] Research is defined as "… a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." The research must be referable to specific, identifiable research projects that have been conceived by a

specific faculty member, employee or associate of an educational institution.[1]

[14] This section applies where it is reasonable to conclude that there is "some connection" between the record and the specific, identifiable "research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution."[2]

Representations

[15] The university submits that the records are linked to research, falling within the definition of research. It goes on to argue that it is more than reasonable to conclude that there is "some connection" between the records and research that was conducted by a professor, who is a university employee.

[16] In particular, the university submits, records 13 to 16 relate to the development of a proposal for a new innovative professional Master's Degree, and these records reveal the university's strategy in soliciting third parties' input on the university's proposal.

[17] With respect to records 249 and 268, the university submits that they relate to academic discussions between the then President of the university and a professor regarding the professor's academic interests and research, and that the portions of these records that were not disclosed to the appellant are actually not responsive to the request, because they do not relate to the organization named in the access request.

[18] Lastly, the university submits that section 65(9), which is the exception to section 65(8.1), and that section 65(10), which provides for the application of the *Act* if the records contain material for the purpose of section 49(c.1), do not apply.

[19] The affected party submits that records 53 and 146 contain a discussion about proposed research opportunities between it and the university, although no research was ultimately conducted.

Analysis and findings

[20] I find that the exclusion in section 65(8.1)(a) does not apply to records 13, 14, 15, 16, 53 and 146. Therefore, I find that they are not excluded from the scope of the *Act*.

[21] In Order PO-3243, Adjudicator Stella Ball considered the application of the section 65(8.1)(a) exclusion to similar records of a university. In finding that the

---

[1] Order PO-2693.
[2] Order PO-2942; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.).

exclusion did not apply, Adjudicator Ball stated the following:

> Previous orders of this office have established that records must relate to specific, identifiable research projects in order to be excluded under section 65(8.1)(a) of the *Act*. In adopting this approach, I note that the email records in this appeal are communications aimed at organizing the preparation of future research project proposals in compliance with certain timelines. The emails discuss possible research initiatives, potential research partnerships and prospective avenues of research funding. While the emails refer to academic disciplines and related research funding options, they do not refer to any "specific, identifiable research projects that have been conceived." Because the records do not reveal any specific, identifiable and conceived research project, they do not satisfy the requirement that the research be "conducted or proposed" in order to qualify for exclusion under section 65(8.1)(a). Therefore, I find that the records are not excluded from the *Act* by section 65(8.1)(a).

[22] Further, in Interim Order PO-3463-I, Adjudicator Stephanie Haly found that a university had not established that the exclusion in section 65(8.1)(a) applied to the records at issue, which were predominantly emails between a professor who acted as the Goldcorp Chair and other individuals within the university. The communications related to possible research partnerships and initiatives involving the university Goldcorp Chair and outside organizations. Some of the records were also draft letters concerning possible partnerships for Goldcorp Chair initiatives. Adjudicator Haly found that while all of the records related to the Goldcorp Chair, they did not refer to any "specific, identifiable research projects that have been conceived." As the records did not relate to any specific, identifiable and conceived research project, there was insufficient connection between them and any such research, and she found that the exclusion in section 65(8.1)(a) did not apply.

[23] Applying and adopting the approach taken by both Adjudicators Ball and Haly, I find that records 13, 14, 15 and 16,[3] which are emails between a professor at the university and other individuals regarding the development of a new graduate program, do not relate to a specific, identifiable and conceived research project. Accordingly, the requirement that there be "some connection" between the records and a specific, identifiable and conceived research project has not been met. As a result, I find that the exclusion in section 65(8.1)(a) does not apply to these records. The university has also claimed the application of the discretionary exemption in section 18(1) to these records, which I consider under Issue C of this order.

[24] The affected party has claimed that the exclusion in section 65(8.1) applies to

---

[3] I note that the content of record 13 is duplicated in records 14, 15 and 16.

records 53 and 146. The application of this exclusion removes the records from the scope of the *Act*. Given that whether an exclusion under the *Act* applies to a record is a jurisdictional issue, I will allow the affected party to claim the application of the exclusion, despite the fact that the university did not claim the exclusion with respect to records 53 and 146. Record 53 consists of an email, cover letter, draft memorandum of understanding and a brief regarding the affected party's activities. I find that this record relates to the relationship between the affected party and the university, in general. It does not relate to a specific, identifiable and conceived research project. Accordingly, I find that the requirement that there be "some connection" between the record and a specific, identifiable and conceived research project has not been met, and the exclusion does not apply to record 53.

[25] Record 146 consists of two emails, with an attached letter-style email describing the relationship between the university and the affected party. I find that, as is the case with record 53, this record does not related to a specific, identifiable and conceived research project. As a result, I find that the requirement that there be "some connection" between the record and a specific, identifiable and conceived research project has not been met, and the exclusion does not apply to record 146. The affected party and the university are claiming the application of the mandatory exemption in section 17(1) to records 53 and 146, which I consider below.

[26] Lastly, turning to records 249 and 268, on my review of them, I find that they are not responsive to the appellant's request, as they do not relate at all to the organization named in the request. These records, which consist of emails between a professor and the former President of the university relate to other issues altogether. As a result of not being responsive to the request, records 249 and 268 will not be disclosed to the appellant.

Issue B: Does the mandatory exemption at sections 17(1)(a), (b) and/or (c) apply to the records?

[27] Both the university and the affected party are claiming the application of the mandatory exemption in section 17(1)(a), (b) and/or (c) to records 6-12, 19-23, 25-29, 32, 43, 49-51, 53, 59, 60, 71, 76, 82, 98-100, 128-130, 134, 136, 137, 139, 142-147, 149, 151, 160, 162, 163, 172, 173, 175, 176, 182, 187, 189, 199, 200, 201 and 242.

[28] By way of background, the affected party describes itself as a forum for mining industry representatives and non-government organizations to discuss community development in the mining context. The affected party states that its organization was formed in an environment where there was limited trust and a fair amount of tension between the sectors. As a result, it operates all practices under the "Chatham House" rules, in which members agree not to attribute comments or views to any one person or organization.

[29] Section 17(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[30] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[5]

[31] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[32] The types of information listed in section 17(1) have been discussed in prior orders:

---

[4] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[6]
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[7] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[8]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[9]

Representations

[33] The university submits that the records at issue contain the affected party's commercial information, including confidential planning information, thus meeting the first part of the three-part test.

[34] The affected party submits that the records are "informational assets" and consist of trade secrets, which include descriptions of its programmes, methods, techniques and processes. In addition, the affected party argues, the records consist of draft or final business plans, budgets that include salaries, workshop agendas, membership agreements and meeting notes.

---

[6] Order PO-2010.
[7] Order PO-2010.
[8] Order P-1621.
[9] Order PO-2010.

Analysis and findings

[35] I find that all of the records for which section 17(1) has been claimed contain "commercial information" for the purpose of the first part of the three-part test. In particular, the records reflect the non-profit exchange of services between the university and the affected party.[10] In addition, I find that records 43, 130, 134, 136, 137, 175, 176, 182 and 201 also contain "financial information" relating to the affected party, such as budgetary information and financial updates.

[36] Concerning the affected party's position that some of the information in the records consists of "trade secrets," I do not find that there is anything in these records that would qualify as a "trade secret" for the purpose of the first part of the test in section 17(1). In particular, I find that there is no information that would qualify as being formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism.

[37] Having found that all of the records contain commercial information and that some of the records contain financial information, I find that the first part of the three-part test in section 17(1) has been met.

Part 2: supplied in confidence

[38] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[11]

[39] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[12]

[40] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[13]

[41] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

---

[10] I note that most of records 99 and 100 are not responsive to the request. Those portions will not be disclosed to the appellant.
[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.
[13] Order PO-2020.

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[14]

Representations

[42] The university submits that it is evident from the records themselves that the information contained in them was supplied to the university in confidence by the affected party, meeting the second part of the three-part test in section 17(1). In particular, the records capture discussions between university employees that were responsible for planning strategies for the development of research, teaching and training collaborations between the university, the mining sector, and representatives from the affected party. The university goes on to argue:

> In most cases, the projects or arrangements which are being discussed were not yet announced. The nature of the discussions set out in the withheld records themselves demonstrate the expectation of the parties that confidentiality would be maintained.

[43] The affected party asserts that the information in the records was supplied by it to the university with a reasonable expectation of confidentiality, meeting the second part of the three-part test in section 17(1). In particular, the affected party argues that the records:

- were communicated to the university in line with the affected party's commitment to the Chatham House rules and on the basis that they were confidential and would be kept confidential;
- were treated by the authors in a manner that indicates a concern for confidentiality, and some records are labelled "confidential;"
- include information that is not otherwise disclosed or available publicly. None of the records are available on the affected party's website or in any other public arena; and

---

[14] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

- were prepared for discussion amongst Steering Committee members, and there is a clear assumption that they would not be disclosed. This is evident in the draft, confidential or audience markings on some of the records.

Analysis and findings

[44] I find that all of the information in the records for which section 17(1) was claimed was either directly supplied to the university by the affected party, or its disclosure would reveal information that was supplied to the university by the affected party.

[45] I also accept the affected party's position that the information it supplied to the university was done so "in confidence." In particular, I accept the position taken by the affected party that its expectation that the records were supplied in confidence was both subjectively held and objectively reasonable for the following reasons:

- the fact that many of the records were marked "confidential;"

- the records were supplied to the university as part of a collaborative relationship in which correspondence was expected to remain confidential;

- there was no expectation that the information would be made publicly available; and

- the affected party acted with caution to protect the information at issue from disclosure.

[46] All of these circumstances lead me to conclude that the information I refer to above was supplied explicitly or implicitly with a reasonably-held expectation of confidentiality between the affected party and the university. Consequently, I find that the second part of the three-part test has been met with respect to this information. I will go on to determine if the third part of the test has been met.

Part 3: harms

[47] The party resisting disclosure must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm.

[48] How much and what kind of evidence is needed will depend on the type of issue

and seriousness of the consequences.[15]

[49] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[16]

Representations

[50] The university argues that the harm set out in section 17(1)(b) applies to exempt the records from disclosure, meeting the third part of the three-part test. The university goes on to argue that, should the information in the records be disclosed, third parties would not provide this type of information to it in the future.

[51] The affected party submits that sections 17(1)(a) and 17(1)(c) apply to exempt the records from disclosure. With respect to section 17(1)(a), the affected party argues that disclosure of the records could prejudice its competitive position. The affected party asserts that it is a unique organization, which is considering replicating the forum in other jurisdictions. The records contain processes and techniques that are proprietary to the affected party. The affected party further submits that the information in the records has since been updated, and that this older information does not reflect an accurate understanding of the current organization. Disclosure of this outdated information, the affected party argues, could interfere with relationships with current or future members of the organization.

[52] With respect to the application of section 17(1)(c), the affected party submits that the disclosure of the information could cause undue loss in that it could negatively impact relationships. The affected party argues that it has been seen as an approachable organization by its members because it has expressly not had specific positions or policies. The records contain candid discussions from specific individuals about issues that are not the affected party's policy. Disclosure of this information, the affected party submits, could harm relationships between individuals and organizations that have been fostered for many years.

[53] It asserts that, if disclosed, this information could be taken out of context and be misconstrued to represent the affected party's views or values, thus threatening its fundamental philosophy of openness and trust, as well as the way current or future members view it. The information could also be used out of context to promote false information about the affected party. The affected party also notes that in an "op-ed"

---

[15] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[16] Order PO-2435.

false statements were made about it.

Analysis and findings

[54] I find that some of the records at issue are either exempt, in whole, or in part, under section 17(1)(a). The type of information that I find is exempt under section 17(1)(a) includes drafts of a memorandum of understanding, records that contain negotiations between the university and the affected party, a paper authored by the affected party regarding negotiating partnerships, very detailed workshop information, information relating to negotiations between the affected party and other third parties, and the affected party's steering committee's internal workings.

[55] I am satisfied that the disclosure of these records could reasonably be expected to prejudice significantly the competitive position of the affected party, as they would reveal proprietary information, and negotiating techniques, used both with the university and with other third parties. I find that it is reasonable to expect that these negotiating techniques could be used by a competitor to prejudice the affected party's competitive position. In particular, I find that records 8, 9, 11, 12, 19, 20, 25, 28, 129, 130, 134, 136, 137, 139, 142, 143, 144, 145, 151, 160, 162, 163, 175, 176, 182, 187, 189, 201 and 242 are exempt from disclosure in their entirety. I also find that records 7, 10, 27, 43, 53, 59, 76, 82, 98, 99, 100, 128 and 200 are exempt from disclosure, in part, under section 17(1)(a), as there is a reasonable expectation that disclosure of portions of these records could significantly prejudice the affected party's competitive position.

[56] Conversely, I find that the remaining information for which the university and the affected party claimed the application of section 17(1) is not exempt under sections 17(1)(a), (b) and/or (c). This information is located in records 6, 21, 22, 23, 26, 29, 32, 49, 50, 51, 71, 146, 147, 149, 172, 173 and 199, as well as portions of records 7, 10, 27, 43, 53, 59, 76, 82, 98, 99, 100, 128 and 200.

[57] The information that I find is not exempt under section 17(1) consists of the following types of information:

- Emails discussing logistical points, such as arranging meetings or workshops;
- An email with talking points for a signing ceremony;
- Introductory letters to professors regarding the affected party;
- Emails with generic discussions;
- The portion of a business plan that sets out, in general terms, the nature of the affected party's work;
- Two "backgrounders" that set out, in general terms, the nature of the affected party's work;

- Workshop agendas;
- A timeline;
- Descriptions of the organizations participating in workshops;
- Workshop session plans;
- An email with comments on a session that the author had attended; and
- A mailing list email with public announcements from other organizations.

[58] With respect to sections 17(1)(a) and (c), I find they do not apply, as the information at issue is general in nature. I am not persuaded by the affected party that the disclosure of this information could reasonably be expected to cause the harms in either of paragraphs (a) and/or (c) of section 17(1). I find the affected party's arguments to be speculative at best. With respect to the affected party's position that information in the records is no longer accurate, or does not reflect its current policies, I find that any inaccuracies could be simply corrected by the affected party. I also find that disclosure of the fact that the affected party's policies may have changed since the creation of the records does not establish a nexus with the harms contemplated in paragraphs (a) and (c) of section 17(1).

[59] The university's argument is that, should the information in the records be disclosed, third parties would not provide this type of information to it in the future. I find that the university has not provided sufficient evidence to support its position. Section 17(1)(b) requires that it be in the public interest that similar information continue to be so supplied. The university has not provided any evidence that the supply of the remaining information at issue is in the public interest. In any event, I am also not persuaded that third parties could reasonably be expected not to provide similar information in the future. Consequently, I find that section 17(1)(b) does not apply.

[60] In sum, I find that section 17(1) does not apply to exempt the remaining severed information from disclosure. The university is claiming the application of section 18(1)(c) to some of these records, which I consider below.

Issue C: Does the discretionary exemption at section 18(1)(c) apply to the records?

[61] The university is claiming the application of section 18(1)(c) to records 2, 6, 7, 10-16, 18, 21-23, 29, 50, 51, 53, 66, 72, 76, 82, 95, 98, 100, 111, 147, 222, 223, 226, 245 and 248.

[62] Section 18(1)(c) states:

> A head may refuse to disclose a record that contains,

> information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[63] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[17]

[64] For section 18(1)(c) to apply, the institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[18]

[65] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[19]

[66] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[20]

[67] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[21]

---

[17] Toronto: Queen's Printer, 1980.
[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[19] Order MO-2363.
[20] Orders P-1190 and MO-2233.
[21] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

Representations

[68] The university states that the records generally consist of information pertaining to its internal discussions, as well as discussions with external parties, with respect to strategies for the development of research, teaching and training collaborations between the university and the mining sector.

[69] The university goes on to argue that the disclosure of the records would reveal the university's efforts and approaches in pursuing the development of collaborations within a particular area and sector, which would give a competitor information they could use to their advantage and to the detriment of the university. Further, the university submits, disclosure of the records will jeopardize its capacity to continue with these collaborations, to broaden or expand them, and diminish the possibility of establishing new ones in the mining sector or within other sectors.

[70] Lastly, the university asserts that the records do not contain results of any product or environmental testing and, hence, the exception in section 18(2) does not apply.

Analysis and findings

[71] I find that the disclosure of some of the records, either in whole or in part, would reveal the university's negotiating strategy with respect to the negotiation of teaching and training collaborations. I accept the university's argument that the disclosure of this negotiating strategy could be used by a competitor. I further find that the university has established a reasonable expectation of prejudice to its competitive position should a competitor use the information that is contained in some of the records at issue. In particular, I find that records 13, 14, 15, 16, 18, 66 and 95 (in whole) and the covering email in record 76 (in part) are exempt from disclosure under section 18(1)(c), subject to my findings regarding the university's exercise of discretion. I further find that the records do not contain the results of product or environmental testing carried out for the university and, therefore, the exception at section 18(2) does not apply to these records.

[72] However, I find that records 2, 6, 7, 10, 11, 12, 21, 22, 23, 29, 50, 51, 53, 72, 82, 98, 100, 111, 147, 222, 223, 226, 245 and 248 are not exempt under section 18(1)(c). I note that, with the exception of records 2 and 21, I have found portions of the above-listed records to be exempt from disclosure under section 17(1), or not responsive to the request, or no longer at issue.[22] My findings regarding the application of section 18(1)(c) apply to the remaining portions of these records.

---

[22] For example, any information that was withheld under section 21(1) is no longer at issue in the appeal.

[73] I find that the remaining portions of the records at issue contain of the following type of information:

- backgrounders about the nature of the work of the affected party;
- emails making arrangements about meetings and workshops;
- workshop agendas;
- workshop participants and the organizations for whom they work;
- introductory emails;
- a timeline; and
- an email with talking points for a signing ceremony.

[74] In my view, the university has not established how the disclosure of this type of general information could reasonably be expected to prejudice either its economic interests or competitive position. The information I have found not to be exempt under sections 18(1)(c) does not reveal negotiations between the university and the affected party, nor does it reveal the university's negotiation strategy, and I find that any risk of harm to the university is speculative. Consequently, I find that this information is not exempt under section 18(1)(c). As no other exemptions have been claimed with respect to this information, I will order the university to disclose it to the appellant.

Issue D: Did the institution exercise its discretion under section 18(1)(c)? If so, should this office uphold the exercise of discretion?

[75] The section 18 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[76] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations or it fails to take into account relevant considerations.

[77] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however,

---

[23] Order MO-1573.

substitute its own discretion for that of the institution.[24]

[78] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[25]

- the purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

Representations

[79] The university submits that it properly exercised its discretion in denying access to the records for which it claimed section 18, and asserts that it did not act in bad faith or for improper purposes. It argues that it took into consideration the purposes of the *Act*, whether the appellant was seeking his or her own personal information, whether the appellant had a sympathetic or compelling need to receive the information, and whether disclosure of the information at issue would increase public confidence in the operation of the university.

Analysis and findings

[80] I have considered the representations of the university and the affected party. I

---

[24] See section 54(2).
[25] Orders P-344 and MO-1573.

find that the university exercised its discretion in good faith under section 18(1). I find that the university took into account relevant factors in weighing both for and against the disclosure of the information at issue, and did not take into account irrelevant considerations. In my view, the university's representations reveal that they considered the appellant's position and circumstances and balanced them against the university's economic interests. In my view, the university has disclosed as much information as possible to the appellant that is not exempt from disclosure.

[81] Under all the circumstances, therefore, I am satisfied that the university has appropriately exercised its discretion with respect to the information which I have found to be exempt from disclosure under section 18(1) of the *Act*, and I uphold its exercise of discretion.

ORDER:

1. I order the university to disclose records 2 and 21 in their entirety to the appellant by **August 7, 2019** but not before **July 31, 2019**.

2. I order the university to disclose records 6, 7, 10, 22, 23, 26, 27, 29, 32, 43, 49, 50, 51, 53, 59, 71, 72, 76, 82, 98, 99, 100, 111, 128, 146, 147, 149, 172, 173, 199, 200, 222, 223, 226, 245 and 248 to the appellant, in part, by **August 7, 2019** but not before **July 31, 2019**. I have enclosed copies of these records for the university, and have highlighted the portions that are **not** to be disclosed to the appellant. The highlighted portions consist of information that is exempt under either section 17(1) or 18, or not responsive to the request, or no longer at issue.

3. I uphold the university's decision to withhold records 249 and 268 because I find they are not responsive to the request

4. I uphold the university's application of sections 17(1) and 18 for the remaining information.

5. I reserve the right to require the university to provide me with a copy of the records sent to the appellant in order to verify compliance with order provisions 1 and 2.

Original Singed by
Cathy Hamilton
Adjudicator

June 28, 2019